

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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Person To Contact:

Telephone Number:

Refer Reply To:  
CC:PSI:2 – PLR-143659-03

Date:  
November 24, 2003

Legend

X =

Y =

Trust =

State 1 =

State 2 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Dear

This responds to a letter dated July 17, 2003 and subsequent correspondence, submitted on behalf of X and Y by their authorized representative, requesting relief for X under § 1362(b)(5) of the Internal Revenue Code. Additionally, Y requests a time extension under § 301.9100-3 of the Procedure and Administration Regulations for Y to elect to treat X as a qualified subchapter S subsidiary (QSub).

## FACTS

The information submitted states that X was formed as a State 1 corporation on Date 1. X intended to make an S corporation election, effective Date 2, but due to inadvertence, Form 2553, Election by a Small Business Corporation, was never filed. X's attorney was not aware of the relief provision in § 1362(b)(5). Pursuant to advice from X's attorney, to rectify the missed election, on Date 3, Trust, the sole shareholder of X, formed Y, a State 2 corporation and made a timely S election for Y. On Date 4, Trust transferred its interest in X to Y in exchange for all of the shares of Y. Through this restructuring, X became a wholly owned subsidiary of Y. Y relied on its attorney to advise Y of any necessary elections. However, Y was not advised of the need to file a QSub election and thus, no QSub election was filed. On Date 5, X merged into Y with Y surviving. Y represents that provided the requested relief is granted, this transaction qualifies as a reorganization under § 368(a)(1)(F).

## LAW AND ANALYSIS

Section 1362(a) provides that a small business corporation can elect to be treated as an S corporation.

Section 1362(a)(1) provides that the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for such year.

Section 1362(b) provides when an S election becomes effective. If an S election is made within the first two and one-half months of a corporation's taxable year, then that corporation will be treated as an S corporation for the year in which the election was made. If an election is made after the first two and one-half months of a corporation's taxable year, then the corporation will generally not be treated as an S corporation until the following taxable year.

Section 1362(b)(5) provides that if no election is made pursuant to § 1362(a), or if the election is made after the date prescribed for making such an election, and the Secretary determines reasonable cause existed for the failure to timely make the election, then the Secretary can treat such an election as timely made for that taxable year and effective as of the first day of that taxable year.

Section 1361(b)(3)(A) provides that a QSub shall not be treated as a separate corporation, and all assets, liabilities, and items of income, deduction, and credit of a QSub shall be treated as assets, liabilities, and such items of the S corporation.

Section 1361(b)(3)(B) provides that a QSub is any domestic corporation, which is not an ineligible corporation, in which 100 percent of the stock of the corporation is owned by an S corporation, and the S corporation elects to treat the corporation as a QSub.

Section 368(a)(1)(F) provides that the term “reorganization” means a mere change in identity, form or place of organization of one corporation, however effected.

Section 1.1361-3(a) of the Income Tax Regulations provides the time and manner of making a QSub election. A taxpayer makes a QSub election with respect to a subsidiary by filing a Form 8869, Qualified Subchapter S Subsidiary Election, with the appropriate service center.

Section 1.1361-3(a)(4) provides that a QSub election cannot be effective more than two months and 15 days prior to the date of filing.

Section 1.1361-4(a)(2) provides that if an S corporation makes a valid QSub election with respect to a subsidiary, the subsidiary is deemed to have liquidated into the S corporation.

Section 1.1361-4(a)(2)(i) provides that if an S corporation makes a valid QSub election, the tax treatment of the liquidation or of a larger transaction that includes the liquidation will be determined under the Internal Revenue Code and the general principals of law, including the step transaction doctrine. Thus, for example, if an S corporation forms a subsidiary and makes a valid QSub election effective on the date of the subsidiary's formation, the transfer of assets to the subsidiary and the deemed liquidation are disregarded, and the corporation will be deemed to be a QSub from its inception.

Section 1.1361-4(a)(4) provides that, except for purposes of §§ 1361(b)(3)(B)(i) and 1.1361-2(a)(1), the stock of a QSub shall be disregarded for all federal tax purposes.

Section 1.1361-4(b)(3)(i) provides that if an S corporation does not own 100% of the stock of the subsidiary on the day before the QSub election is effective, the liquidation into the S corporation occurs immediately after the time at which the S corporation first owns 100% of the stock.

Section 1.1361-4(b)(3)(ii) provides that, except as otherwise provided in § 1.1361-4(b)(4) (relating to S corporations making elections under § 338), if a corporation for which an election under § 1362(a) was in effect is acquired, and a QSub

election is made effective on the day the corporation is acquired, the acquired corporation is deemed to liquidate into the S corporation at the beginning of the day the termination of its S election is effective. As a result, if corporation X acquires Y, an S corporation, and makes an S election for itself and a QSub election for Y effective on the day of acquisition, Y liquidates into X at the beginning of the day when X's S election is effective, and there is no period between the termination of Y's S election and the deemed liquidation of Y during which Y is a C corporation.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant reasonable extensions of time to make regulatory elections under the rules of §§ 301.9100-2 and 301.9100-3. Under § 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3 sets forth the standards that the Commissioner uses to determine whether to grant a discretionary extension of time. These standards indicate that the Commissioner should grant relief when the taxpayer provides evidence proving to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

## CONCLUSION

Based solely on the facts submitted and representations made, we conclude that X has established reasonable cause for failing to make a timely election to be an S corporation. Accordingly, provided that X makes an election to be an S corporation by filing a completed Form 2553 with the appropriate service center effective Date 2, within 60 days following the date of this letter, then such election will be treated as timely made for Date 2. A copy of this letter should be attached to that form.

Additionally, based solely on the facts submitted and representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. As a result, Y is granted an extension of time of 60 days from the date of this letter to file Form 8869 with the appropriate service center to treat X as a QSub effective Date 4. Accordingly, provided that X makes the above-mentioned S corporation election and Y makes a QSub election for X within 60 days following the date of this letter effective Date 4, then such election will be treated as timely made for Date 4. A copy of this letter should be attached to the Form 8869. Additionally, we conclude that there will be no period between the termination of X's S election and the deemed liquidation of X during which X will be a C corporation.

Except as expressly provided herein, no opinion is expressed concerning the Federal tax consequences of any aspect of the facts described above under any other provision of the Internal Revenue Code. In particular, no opinion is expressed concerning whether X or Y was or is a small business corporation, whether X is or was eligible to be a QSub, and whether the described transactions constitute a reorganization under § 368(a)(1)(F).

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to the taxpayer's representative.

Sincerely,

Heather Maloy  
Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosures (2)  
Copy of this letter  
Copy for section 6110 purposes